

# Judicial Communications Office

Wednesday 11 September 2019

## COURT REFUSES APPEAL BY EAMON FOLEY

### Summary of Judgment

The Court of Appeal<sup>1</sup> today refused an application for leave to appeal by Eamon Foley against his conviction for failure to make an annual notification under the Sexual Offences Act 2003.

#### Background

Eamon Foley (“the applicant”) was convicted of rape in 2001 and as part of his sentence was required to sign the Sex Offenders Register (pursuant to the Sex Offenders Act 1997 (“the 1997 Act”)) and was subject to the notification requirements contained in Part 1 of that Act. This required him to notify the police of his name, date of birth and address within 14 days of his release from prison and to notify the police of any change of name, change of address or if he was staying at an address for 14 days or more. Notification could be done orally at a police station or in writing. The penalty for non-compliance with the requirements was a maximum of six months’ imprisonment. As the applicant in this case had been sentenced to a period of greater than 30 months, the notification period was “an indefinite period”.

During the time when the applicant was in custody serving his sentence, Parliament replaced the requirements of the 1997 Act with a new regime under the Sexual Offences Act 2003 (“the 2003 Act”). Part 2 of the 2003 Act provides for periodic notifications and stipulates that an offender must make an initial notification to the police within three days of his release. As well as providing his name, date of birth and address, the offender must give the police his National Insurance number and passport details. The offender must provide notification of a change of address within seven days and must notify the police if he is going to be absent from his home address for more than three days. Notification must be made annually. Section 91 of the 2003 Act prescribes the penalty for non-compliance with the notification requirements and increased it to a potential maximum of five years’ imprisonment if convicted on indictment.

On 1 February 2015, the applicant failed without reasonable excuse to comply with the notification requirements in the 2003 Act by not making an annual re-notification. He was convicted on 17 May 2017 and the trial judge imposed a determinate custodial sentence of one year (six months in custody and six months on licence). The applicant sought leave to appeal against his conviction.

The Court of Appeal requested submissions on the following matters:

- Whether the provisions of section 91 of the 2003 Act are compatible with Article 7 of the European Convention on Human Rights (“ECHR”) and if not, whether the court ought to make a declaration of incompatibility;

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<sup>1</sup> Lord Justice Treacy delivered the judgment of the Court. The panel was Lord Justice Treacy, Sir Paul Girvan and Sir Ronald Weatherup.

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- Whether a determination that section 91 is not compatible with the ECHR rights of the applicant may afford a “reasonable excuse” (as provided for by section 91(1)(a)) for non-compliance) and a defence to the charge; and
- If not, whether the sentencing judge may have regard to such declaration of incompatibility in determining the appropriate sentence for the offence.

## **Is section 91 ECHR Compliant?**

Article 7 ECHR provides that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

In this case the applicant was convicted before the 2003 Act, and the more onerous notification requirements, were commenced. The Court referred to case law from the European Court of Human Rights in respect of notification requirements. It held that the notification requirements did not breach Article 7 ECHR as it cannot be said that they amount to a “penalty” as they do not, ultimately, require more than mere registration and as they operate completely separately from the ordinary sentencing procedures. The Court said it was clear that the notification requirements of the 2003 Act to which the applicant in this case is now exposed are both more extensive and failure to adhere to them carry a greater maximum penalty, the requirements in themselves are not a penalty under Article 7 and are not any more part of a sentencing regime than were the requirements under the 1997 Act.

The Court concluded that it was clear from the jurisprudence that the imposition of the enhanced notification requirements do not constitute a penalty within the meaning of Article 7 ECHR: “The provisions reflect the need for an effective scheme for preventative and deterrent purposes rather than punitive penalty.”

On the basis of this conclusion, the Court said the other two questions it had posed did not arise for determination.

The Court refused the application for leave to appeal.

## **NOTES TO EDITORS**

This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (<https://judiciaryni.uk>).

## **ENDS**

If you have any further enquiries about this or other court related matters please contact:

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